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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

| | |
|---|---|
| **MARK SERRANO,** Petitioner, **v.** **MARY BUTLER, Chief Probation Officer,** Respondent. | C 06-04433 JW **ANSWER** |

This is respondent's answer to the petition for writ of habeas corpus.

## I. CUSTODY

When the federal habeas petition was filed petitioner was in constructive custody following entry of a valid judgment in Napa Superior Court case number CR113118, after a jury trial, for attempted rape. The court suspended imposition of sentence and ordered three years' probation.

## II. EXHAUSTION

Petitioner exhausted state remedies by presenting his claim to the California Supreme Court in a petition for review which was denied. Exhs. B, C.

## III. PROCEDURAL DEFAULT

We do not assert procedural default.

## IV. DENIAL

There is no merit to petitioner's claim that the state statute under which he was charged failed to give him notice that his conduct was unlawful.

## V. TIMELINESS

We do not assert untimeliness.

## VI. RECORDS

Respondent submits transcripts of the trial and other records as described in the Notice of Lodging of Exhibits.

## VII. CONCLUSION

The petition should be denied.

Dated: October 16, 2009

Respectfully submitted,

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| **MARK SERRANO,**<br>Petitioner,<br>**v.**<br>**MARY BUTLER, Chief Probation Officer,**<br>Respondent. | C 06-04433 JW<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER** |

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## STATEMENT OF THE CASE

Petitioner was a California probationer when he filed a petition for writ of habeas corpus in this Court under 28 U.S.C. § 2254, challenging a judgment of conviction from the Superior Court of California, Napa County.

The Napa County District Attorney charged petitioner by information with attempted rape. (Cal. Pen. Code §§ 261, subd. (a)(2) and 664.) The jury found petitioner guilty. On November 3, 2003, the court suspended imposition of sentence and placed petitioner on three years' probation. Exh. A, p. 1, 3.

The California Court of Appeal affirmed the judgment on March 17, 2005. Exh. A, p. 1. The California Supreme Court denied review on June 29, 2005. Exh. B. The federal habeas corpus petition was filed on July 20, 2006.[1]

## STATEMENT OF FACTS

The California Court of Appeal summarized the facts as follows:

> Defendant met and became friends with the victim, Carrie H., while they were both students at a college in North Carolina. Defendant moved to California after his graduation. Carrie telephoned defendant in the Fall of 2002 and told him of her professional interest in the wine industry in the Napa Valley, where defendant worked. Defendant offered to let Carrie stay at his house and to show her around during her visit. Carrie stayed with defendant for two and a half weeks, during which time she accepted a job in the Napa Valley and commenced an intimate relationship with defendant. Defendant offered to let Carrie stay at his house while she looked for a permanent place to live, and Carrie accepted the offer.
>
> The two got along well initially but eventually began to argue. On one occasion in February 2003, defendant got mad and hit Carrie because he did not like the music she played on the car stereo. She moved out of defendant's home on March 1. The two continued to date until April 15th when Carrie ended the relationship.
>
> Over the next several days, defendant left voice mail messages for Carrie, which she did not return. When Carrie finally answered a telephone call from defendant on April 22, he was angry that she had not returned his earlier calls. Carrie told defendant that their relationship was over. Defendant said that he wanted to see her one more time, but Carrie refused. Defendant then told Carrie that he wanted to

[1] Although it appears that petitioner is no longer on probation, he was at the time he filed the petition, which satisfied the statutory custody requirement. 28 U.S.C. § 2254(a). In addition, under Ninth Circuit law petitioner has satisfied the constitutional case-or-controversy requirement and the case is not moot, because the circuit has established an irrebuttable presumption of continuing collateral consequences from any criminal conviction. *Chacon v. Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994).

make a video recording of the two of them engaging in sexual acts as she had done with a previous boyfriend.

The next morning, defendant telephone Carrie and told her he had stolen the video she had made with her old boyfriend (the prior video) from her car. He stated that if she did not make a sex video with him he would e-mail copies of the prior video to her employer, her school contacts, and to amateur pornography websites. He said he would return the prior video to her if she made a new sex video with him. Carrie asked defendant why he was doing this to her, but he did not respond. Defendant told Carrie that something worse would happen to her if she went to the police about his demand.

Carrie did not want the prior video to be revealed to others because she was embarrassed about it and was afraid that it could mar her professional relationships to the extent that she would lose her job. She considered making a sex video with defendant for these reasons. Instead, Carrie reported defendant's threats to the Napa police.

Carrie provided the police with a copy of an e-mail message that defendant had sent her. The e-mail from defendant originated from the address "Carrie[victim's last name]@hotmail.com." The message explained that defendant would use that address to e-mail prior video to her various contacts, and that the longer Carrie took to comply with his demands the "'the more personal the recipients [would] be.'" "'In addition, graphic intensity of the file will increase.'" Defendant also explained that he was coercing her to pay her back for disrespecting him and other men she previously dated. He wrote that they should follow through on his plan the next day.

The police recorded "pretext telephone calls" between Carrie and defendant discussing his ultimatum. During one of these telephone calls, defendant arranged for Carrie to come to his home at 7 p.m. to make the video. Police officers who served a search warrant on defendant's residence at the designated time found him at home with music playing, candles lit, two wine glasses set out, a video camera on a tripod aimed at the bed, and an assortment of sex toys displayed. The police also found an explicit three-act script of sexual activities for the new sex video as well as two copies of a video recording of Carrie engaged in sexual acts with another man.

The defense elicited testimony that Carrie is an educated, confident marketing and public relations professional.

Exh. A, pp. 1-3.

**STANDARD OF REVIEW**

A federal court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C., § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." *Id.* § 2254(d); *Williams v. Taylor*, 120 S.Ct. 1495, 1523 (2000). In deciding whether the state court's decision is contrary to or unreasonable application of clearly established federal law, the federal court looks to the decision of the highest state court to address the merits of a petitioner's claim in a reasoned decision. *LaJoie v. Thompson*, 217 F.3d 663, 669 n. 7 (9th Cir. 2000).

## ARGUMENT

### I. THE STATE COURTS REASONABLY REJECTED PETITIONER'S CLAIM OF LACK OF NOTICE

Petitioner was convicted of attempted rape. He claims "application of the rape statute to petitioner's alleged conduct violated his federal constitutional right to due process of law because it failed to provide him with fair warning that such conduct was actionable under the rape statute . . . ." Pet. 14. The California Court of Appeal rejected this claim:

> California law currently defines rape as an act of nonconsensual sexual intercourse accomplished by various improper methods, including "[w]here it is accomplished against a person's will by means of force, violence, *duress*, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2), italics added.) Duress is any "direct or implied threat of force, violence, danger, or *retribution* sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted."[2] (§ 261, subd. (b), italics added.) The finder of fact should consider "[t]he total circumstances, including the age of the victim, and his or her relationship to the defendant" to determine whether duress arose. (§ 261, subd. (b).)
>
> Under prior law, the crime of rape was distinct from any sex crimes in that it could not be committed by means of duress. (*People v. Leal* (2004) 33 Cal.4th 999, 1005.) In 1990, the Legislature amended section 261 to add duress to the list of improper methods of accomplishing unwanted sexual intercourse, and added a definition of duress that was already used in several offense statutes, including sex crimes against children. (Stats. 1990, ch. 630, § 1, pp. 3096-3097; see also *People v. Leal*, *supra*, 33 Cal.App.4th at pp. 1004-1005; *People v. Pitmon*, *supra*, 170 Cal.App.3d 38 at p. 48; see also CALJIC No. 10.00 [defining duress].) As discussed below, the original definition of duress added to section 261 included threats of

[2] This definition of duress was taken from *People v. Pitmon* (1985) 170 Cal.App.3d 38, 48 (*Pitmon*).

hardship in addition to the methods of coercion currently listed in that section. (Stats. 1990, ch. 630, § 1, pp. 3096-3097.)

A key purpose of the 1990 amendment of section 261 was to assist in the prosecution of date and acquaintance rape cases, which frequently are not accomplished by means of physical force or violence. (Sen. Bill. No. 2586, 3d reading (1989-1990 Reg. Sess. July 7, 1990).) Thus, the term duress was defined broadly to include not just physical threats but also "other means which coerce or tend to coerce the will of another, or induc[e] the victim to do an act contrary to his or her free will." (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 2586 (1989-1990 Reg. Sess.) as amended April 17, 1990. Par. 3.)

Defendant observes that the Legislature amended the rape statute in 1993 to eliminate threats of hardship from the definition of duress.[3] (Stats. 1993, ch. 595, § 1, 2, pp. 3120-3122; *People v. Leal*, *supra*, 33 Cal.App.4th 999 at p. 1007.) He thus argues that the 1993 amendment of section 261 shows that the Legislature did not intend to punish threats of social or economic retribution in adult rape cases.

Duress inherently involves psychological coercion, as the term duress would be redundant if its meaning were no different from the terms force, violence, menace, or fear of bodily injury that are also listed in section 261. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 15; *Pitmon*, *supra*, 170 Cal.App.3d 38 at p. 50; *People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 237; *People v. Senior* (1992) 3 Cal.App.4th 765, 775.) Retribution, which is included in the statutory definition of duress, is defined as repayment or punishment, neither of which is necessarily physical. (Merriam-Webster's Coll. Dict. (11th ed. 2003) p. 1065; Oxford English Dict. CD-ROM 2d ed. 1989.) Accordingly, duress has been found where the defendant issued threats of humiliation and shame if the victim did not comply. (*People v. Superior Court (Kneip)*, *supra*, 219 Cal.App.3d at p. 237 [child molest conviction].)

Duress by psychological coercion may thus properly support a sexual assault conviction where the victim is an adult. In *People v. Cardenas* (1994) 21 Cal.App.4th 927, 929, the defendant held himself out to be a "curandero," or faith healer. He advised Selsa, age 26, that she would lose her spirit, die, or be killed if she did not submit to his treatments, which included substantial sexual contact. (*Id.* at pp. 932-936.) Selsa was reluctant to allow the defendant to perform the specific acts for which he was convicted, but nonetheless acquiesced. (*Id.* at 938.) Ultimately, Cardenas took nearly complete control of Selsa's daily life. (*Id.* at pp. 938-939.) Cardenas claimed on appeal that this evidence did not support the findings that the sexual activities were accomplished through force, duress, or fear of bodily injury, and that at most he had achieved sexual contact by fraud (§ 266c). (*Id.* at pp. 930, 937.) The court held that the jury reasonably found that Cardenas's manipulation of Selsa's strongly held religious beliefs constituted duress. (*Id.* at pp. 939-940.) We conclude that, contrary to defendant's assertion, the Legislature did intend to encompass threat of nonphysical conduct within the definition of duress under section 261, subdivisions (a)(2) and (b).

* * *

[3] Other statutes, such as commission of a lewd act on a child (§ 288, subd. (c)(1)), were not modified to remove the threat of hardship from the definition of duress. (*People v. Leal*, *supra*, 33 Cal.4th at p. 1007.)

Defendant claims that section 261, subdivision (a)(2) is unconstitutionally vague as applied to his case because it does not notify him that the type of coercion he tried to use to obtain consensual sex constituted duress and thus could result in criminal prosecution. He also claims that section 261 is vague because the jury's evaluation of the effects of duress on a reasonable person of ordinary susceptibilities is inconsistent with examining the "totality of the circumstances." We disagree with these contentions.

A law is unconstitutionally vague if it fails to provide adequate notice to those who must observe its limits. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332; see U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 15.) "In evaluating a vagueness claim, 'the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" (*People v. Powers* (2004) 117 Cal.App.4th 291, 298, quoting *United States v. Lanier* (1997) 520 U.S. 259, 267.) Thus, a statute is not impermissibly vague if its terms can be reasonably understood by reference to other definable sources such as statutes, legislative history, and judicial decisions. (*American Civil Liberties Union v. Board of Education* (1963) 59 Cal.2d 203, 218; *People v. ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116-1117; *County of Nevada v. McMillen* (1994) 11 Cal.3d 662, 673; *People v. McCaughan* (1957) 49 Cal.2d 409, 414; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 569-570.)

1. Definition of duress

The *Pitmon* definition of the term duress with respect to sex crimes has been consistently used in statutes and case law for almost 20 years. (*People v. Leal*, *supra*, 33 Cal.4th at pp. 1004-1005.) Although adult rape cases are rarely prosecuted under the theory of nonphysical duress, the statutory language and legislative history discussed above, as well as cases analyzing similar statutory language, show that the Legislature did not intend to limit the definition of rape to those acts accomplished by physical force or threat. (E.g., *People v. Harless* (2004) 125 Cal.App.4th 70, 91 [upholding conviction for molestation accomplished by threat of sending child to foster care]; *People v. Cochran*, *supra*, 103 Cal.App.4th at p. 15 [threat of breaking up marriage or family may show duress].)

Carrie's belief that defendant's delivery of her prior sex video to her employer, business contacts, and internet pornography websites would ruin her career appears more common and reasonable for an ordinary person than was Selsa's belief in Cardena's power to scare away evil spirits.[4] (See *People v. Cardenas*, *supra*, 21 Cal.App.4th 927 at pp. 932-933.) Carrie's marketing profession depended on her ability to anticipate and mold public reaction to her employers' products. The distribution of an explicit sex video to Carrie's employer and professional contacts would at least cause the recipients to second-guess her ability to manage her professional image, jeopardizing her future employment.

Defendant was aware that Carrie was a serious professional who intended to pursue her marketing career in the Napa Valley, and that she had invested in moving to the area for that purpose. He threatened to destroy a commodity of great

[4] The court in *Cardenas* attributed Selsa's belief in defendant's curative powers in part to her emotional delicacy, lack of formal education, and inability to communicate in English. (*People v. Cardenas*, *supra*, 21 Cal.App.4th at pp. 932-933; see also § 261, subd. (b).)

> fundamental value to Carrie, her career, in order to coerce her to engage in sexual activities with him. Carrie did in fact consider making the sex video with defendant in order to prevent harm to her career. Defendant's actions were thus analogous to Cardenas's threats to Selsa's spiritual salvation. The fact that defendant threatened Carrie with greater retribution if she went to the police shows that he had some conscious idea that his actions were illegal. Section 261, its legislative history, and *Cardenas*, *supra*, 21 Cal.App.4th 927 notified defendant that his actions might constitute duress, i.e., a "retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed . . . ." (§ 261, subd. (b).) Defendant's conviction was not a "novel construction" of duress as defined in section 261. (See *United States v. Lanier*, *supra*, 520 U.S. 259 at p. 266.)

Exh. A, pp. 4-6, 11.

In *Rogers v. Tennessee*, 532 U.S. 451 (2001), approving the retroactive application of a decision abolishing the common law death within a year-and-a-day rule in a murder prosecution, the Supreme Court said: "[a] judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.* at 458. *See also Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964); *Webster v. Woodford*, 361 F.3d 522 (9th Cir. 2004). (Radical and unforeseen change); *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) ("unpredictable" shift); *People v. Sapp*, 31 Cal.4th 240, 285 (2003) (holding of *People v. Howard*, 44 Cal.3d 375 (1988), that corpus delecti rule does not apply to financial gain special circumstance, was not an unforeseeable change in law that lessened prosecutor's burden of proof; application of holding to crime committed before date of decision did not violate ex post facto rule); *In re Jesus O.*, 40 Cal.4th 859, 869 (2007) (holding that assailant who picks up property dropped by victim during flight commits grand theft from the person was not an unforeseeable enlargement of criminal statute, but a routine interpretation of existing law, and did not violate ex post facto rule). The terms of a law are interpreted in context and not in the abstract. *American Commc'ns Ass'n v. Douds*, 339 U.S. 382, 412 (1950) "(Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."); *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1984). The Constitution necessarily tolerates an amount of vagueness. *Cal. Teachers Ass'n. v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001).

The rules applicable to petitioner's claim that application of California Penal Code section 261, subdivision (b) to him is unconstitutional, were summarized by the California Supreme Court in *People ex rel Gallo v. Acuna*, 14 Cal.4th 1090, 1115-1119 (1997):

> [T]he claim that a law is unconstitutionally vague is not dependent on the interests of absent third parties. Instead, the underlying concern is the core due process requirement of adequate *notice*. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." [Citations.] The operative corollary is that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [Citation.]
>
> In its more recent application of the vagueness doctrine, the high court has also expressed a concern for the potential for arbitrary and discriminatory enforcement inherent in vague statutes. [Citations.] . . . Thus, a law that is "void of vagueness" not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]
>
> . . . [A] claim that a law is unconstitutionally vague can succeed *only* where the litigant demonstrates, not that it affects a substantial number of others, but that the law is vague as to her or "impermissibly vague in *all of its applications*." [Citations.]
>
> We begin our consideration of defendants' vagueness claims with a pair of principles endorsed by the United States Supreme Court as reliable guides for applying the doctrine in particular cases. The first principle is derived from the concrete necessity that abstract legal commands must be applied in a specific *context*. A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness. Indeed, in evaluating challenges based on claims of vagueness, the court has said "[t]he particular context is all important." [Citations.] . . .
>
> The second guiding principle is the notion of "*reasonable* specificity" [Citation] or "'"[*r*]*easonable* certainty."'" [Citation.] [statute will not be held void for vagueness "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources"].) As the high court has pointed out, "few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an are of proscribed conduct shall take the risk that he may cross the line." [Citation.] In short, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." [Citation.]

Penal Code section 261, subdivision (a)(2), defines rape, in pertinent part, as an act of sexual intercourse accomplished against the person's will by means of duress. Penal Code section 261, subdivision (b), defines duress as follows:

> (b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

Petitioner claimed the statutory definition of "duress" is unconstitutionally vague because the "outer boundary" of "to coerce" is not defined, the definition is internally inconsistent because it applies the "reasonable person of ordinary susceptibilities" test, but includes in the "total circumstances" facts peculiar to the victim and the defendant; and threat of future "retribution" is vague and might exclude entreaties of jilted lovers seeking their partners' return to a sexual relationship. Each of petitioner's points is meritless. "The statutory language of the provision defining 'duress' in each of the rape statutes is clear and unambiguous." *People v. Leal*, 33 Cal.4th 999, 1007.

As the state court observed, "to coerce" is not so uncertain or indefinite a term as to impair the statute's validity. *See* Merriam Webster, Collegiate Dictionary, 10th edition, 1995, p. 222. "General terms may be used in a statute to describe things according to the common understanding of such terms." *People v. Lavine*, 115 Cal.App. 289, 295 (1931). Moreover, subsection (b) precisely defines the type and degree of coercion required: a direct or implied threat of force, violence, danger, or retribution, sufficient to coerce "a reasonable person of ordinary sensibilities" to "perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted." This was sufficient to put petitioner on notice that he should not attempt to coerce Carrie into having sexual intercourse and oral sex with him by threatening to destroy her career and reputation and expose her to public humiliation by sending copies of her sexually explicit tape to her employer, alma mater, and Internet porn sites. In addition to the state cases cited by the court of appeal, in *People v. Moore*, 196 Cal.App.2d 91 (1961), the court stated "every person who takes any woman unlawfully,

against her will, and by force, menace, or duress, compels her . . . to be defiled" is guilty of a felony. "All of the elements of this offense are included in the statement of facts heretofore outlined; the [defendant's] threats to arrest Miss Wilks and take her children from her constitute a menace (Civ. Code, § 1570); proof of the use of force was not necessary to establish the unlawful taking [citations] and the act of sexual intercourse in question constituted a defilement [citations]." Plainly, there is no basis for a claim of surprise in 2002 that sex by psychological coercion amounts to rape.

Subdivision (b) is not internally inconsistent in requiring "a reasonable person of ordinary sensibilities" in "the total circumstances" of the case, including the age of the victim and the relationship of the parties. Such a formulation precludes the victim from setting up his or her own standard of conduct and condemning the defendant because she felt coerced, unless the circumstances in which the victim was placed, and the facts that confronted her, were such as would have coerced the ordinarily reasonable person faced with the same situation. A similar formulation has long governed assessment of evidence of heat of passion offered to reduce a homicide to manslaughter under California law. See CALJIC No. 8.42. This formulation is straight forward; it is not so vague as to render subsection (b) unconstitutional.

In speculating that threat of future retaliation might include entreaties of jilted lovers, petitioner ignored the fact that he did not merely plead with Carrie to return to him. He threatened to ruin her career and reputation, and expose her to public humiliation, by sending copies of her sexually explicit tape to her employer, her alma mater, and Internet porn sites, if she refused to engage in videotaped sexual intercourse and oral sex with him. As the state court reasonably concluded, this conduct amounted to attempted rape and did not constitute a novel construction of duress.

In *People ex rel Gallo v. Acuna, supra*, the defendants claimed, and the Court of Appeal had found, that a preliminary injunction was unconstitutionally vague, in part, because it left certain words undefined. The Supreme Court rejected the claim:

> [A]ccording to the Court of Appeal, provision (k) fails to define sufficiently the words "confront," "annoy," "provoke," "challenge," or "harass"; it thus fails to provide a standard of conduct for those whose activities are proscribed. Yet similar

> words were upheld against claims of vagueness by the Supreme Court in *Madsen, supra*, 512 U.S. 753. There, the high court affirmed injunctive relief prohibiting petitioners from engaging in similar—if not more broadly phrased—conduct: '"intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving.'" (*Id.* at pp. 760-761 [114 S.Ct at p. 2522].) We find nothing in the context of this case, factually similar in many respects to the situation before the court in *Madsen*, that makes the same words, sufficiently definite there, somehow constitutionally infirm here.
>
> Here again, "[t]he particular context is all important." [Citation.] The words of provision (k) which the Court of Appeal considered irretrievably vague are simply not, at least in the constitutional sense, when the objectives of the injunction are considered and the words of the provision are read in context.

A similar approach applies here. Section 261, subdivision (b), is not unconstitutionally vague, especially when read with the purpose of the statute in mind, namely, to prohibit the use of force, violence, or threats of retribution to obtain nonconsensual sex. *See also People v. Leal*, 33 Cal.4th 999, 1001-1002, 1004-1010 (providing a detailed history of "duress" as an element of sex crimes, distinguishing it from the duress defense, and finding that "duress" in Penal Code section 288, subdivision (b)(1) (lewd act on child under 14 by force, violence, duress, etc.) is not overly vague).[5]

If there was federal constitutional error, there was no prejudice. *See Brecht v. Abrahamson*, 507 U.S. 619 (1993). The evidence established that petitioner warned Carrie "that something worse would happen to her if she went to the police about his demand." Exh. A, pp. 1-2. This evidence established petitioner's awareness that his threats were unlawful.

Petitioner does not demonstrate that the state court's rejection of his claim is contrary to clearly established United States Supreme Court authority or objectively unreasonable on the record before the state court.

[5] Petitioner criticizes the California Court of Appeal's reading of California precedent. *See* Pet. 30-36. However, federal courts cannot revisit whether state courts erred in applying state precedents. *See, e.g., Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989); *Paradis v. Arave*, 954 F.2d 1483, 1493 (9th Cir. 1992).

## CONCLUSION

The petition should be denied.

Dated: October 16, 2009

Respectfully Submitted,

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